STATE OF MICHIGAN

COURT OF APPEALS

RICK MOREFIELD,

Plaintiff-Appellant,

v

GRAND TRUNK WESTERN RAILROAD, INC., GRAND TRUNK CORPORATION, and CANADIAN NATIONAL/ILLINOIS CENTRAL,

Defendants-Appellees.

UNPUBLISHED
March 25, 2008

No. 275767
Macomb Circuit Court
LC No. 2005-002786-NO

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). Because the evidence, when viewed in a light most favorable to plaintiff, fails to establish a genuine issue of material fact for trial, we affirm.

Plaintiff, a railroad brakeman/switchman, brought this action against his employer, Grand Trunk Western Railroad, Inc. (GTW), GTW's parent company, Grand Trunk Corporation, and a successor company, Canadian-National/Illinois Central, to recover damages for personal injuries allegedly sustained on December 22, 2003, along Track No. 77, a track used for railroad cars in need of repair. The complaint alleged that plaintiff lost his balance on ballast materials, which consist of stones used to support and provide drainage for the tracks and track structures, while he was coupling railroad cars. In count I, plaintiff alleged that defendants were negligent under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq.* In count II, plaintiff alleged that defendants' violation of federal safety regulations promulgated under the Federal Railroad Safety Act (FRSA), 49 USC 20101 *et seq.*, constituted negligence per se under the FELA. The trial court granted defendants' motion for summary under MCR 2.116(C)(10) and dismissed each count.

Only the trial court's dismissal of count I is at issue on appeal. Plaintiff affirmatively states that he is not challenging the trial court's dismissal of count II. With respect to count I, we apply Michigan's procedural rules and federal substantive law in reviewing the FELA claim. *Jaqua v Canadian Nat'l R, Inc*, 274 Mich App 540, 545-546; 734 NW2d 228 (2007); *Boyt v Grand Trunk W R Co*, 233 Mich App 179, 183; 592 NW2d 426 (1998). Therefore, we shall consider the evidence presented in support of and in opposition to defendants' motion for

summary disposition under MCR 2.116(C)(10) only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999).

> Appellate review of the grant or denial of a summary-disposition motion is de novo, and the court views the evidence in the light most favorable to the party opposing the motion. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003), (citations omitted).]

FELA was designed to enable an injured railroad worker to overcome a number of traditional defenses to tort liability, including assumption of risk and contributory negligence, that previously operated to bar the action. *Jaqua, supra* at 548, citing *Wicker v Consolidated Rail Corp,* 142 F3d 690, 696 (CA 3, 1998); see also 45 USC 53 (adopting comparative negligence standards); 42 USC 54 (abolishing assumption of risk doctrine). Under 45 USC 51,

> every common carrier by railroad engaged in commence . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

An injured railroad worker pursuing a FELA claim must still prove negligence under traditional common-law principles applied in federal courts. *Adams v CSX Transportation,* 899 F2d 536 (CA 6, 1990); see also *Norfolk S R Co v Sorrell,* ___ US ___ ; 127 S Ct 799, 805; 166 L Ed 2d 638 (2007) (absent statutory language to the contrary, the elements of a FELA claim are determined by reference to the common-law); *Consolidated Rail Corp v Gottshall,* 512 US 532, 543-544; 114 S Ct 2396; 129 L Ed 2d 427 (1994). These common-law elements generally have been stated as requiring proof of a duty, breach, foreseeability, and causation. *Adams, supra* at 539.

The causation element under the FELA is "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v Missouri Pacific R Co,* 352 US 500, 506; 77 S Ct 443; 1 L Ed 2d 493 (1957); see also *CONRAIL, supra* at 543. Although it has often been said that FELA only requires slight evidence of negligence, the relaxed standard of proof described in *Rogers, supra,* only applies to causation. *Coffey v Northeast Illinois Regional Commuter R Corp,* 479 F3d 472, 476 (CA 7, 2007). Whether the employer exercised due care is a separate inquiry. *Id.*

The principal issue in this case is whether there is factual support for plaintiff's claim that defendants breached a specific standard of care. Although not stated in the FELA, certain employer duties, including the duty to provide a reasonably safe place to work and the duty to warn employees of unsafe working conditions, have become an integral part of the statute. *Ackley v Chicago & North Western Transportation Co*, 820 F2d 263, 266 n 5 (CA 8, 1987). The duty to provide a reasonably safe workplace encompasses a duty to maintain and inspect work areas. *Sinclair v Long Island R*, 985 F2d 74, 76 (CA 2, 1993). And while railroad employees must exercise care for their own safety, they are entitled to rely on their employer's rules and standards of what they must anticipate. *Kurn v Stanfield*, 111 F2d 469, 473 (CA 8, 1940).

In a more general sense, the traditional common-law rule is that the applicable standard of care for evaluating the employer's negligence, like the evaluation of the employee's negligence, is that of ordinary prudence. *Norfolk S R Co, supra,* 127 S Ct at 807. The employer's liability is predicated on the failure to act as an ordinary prudent person would act under the circumstances. *Gautreaux v Scurlock Marine, Inc*, 107 F3d 331, 338 (CA 5, 1997). Reasonable foreseeability of harm is essential to the action. *Gallick v Baltimore & O R Co*, 372 US 108, 117; 83 S Ct 659; 9 L Ed 2d 618 (1963). Foreseeability has been equated with actual or constructive notice. *Williams v Nat'l R Passenger Corp*, 161 F3d 1059, 1062 (CA 7, 1998); see also *Urie v Thompson*, 337 US 163, 178; 69 S Ct 1018; 93 L Ed 1282 (1949). A plaintiff must prove a breach of duty to protect against foreseeable risks of harm. *Hernandez v Trawler Miss Vertie Mae, Inc*, 187 F3d 432, 437 (CA 4, 1999).

Under the relaxed standard applied in the Second Circuit Court of Appeals, the general rule is that the employer breaches its duty when it knows or should have known of a potential hazard in the workplace, and fails to exercise reasonable care to inform and protect its employees. *Ulfik v Metro-North Commuter RR*, 77 F3d 54, 58 (CA 2, 1996). The common-law rule of foreseeability is the touchstone for this negligence inquiry, but is liberally construed. *Id*. The employer may be held liable for risks too remote to support liability under the common-law. *Williams v Long Island R*, 196 F3d 402, 407 (CA 2, 1999).

We question the use of a relaxed standard of negligence because this might lead to the application of different standards to the employer and employee. Indeed, in *Norfolk S R Co, supra* at 808, the United States Supreme Court rejected dual standards on the issue of causation, stating, "FELA's text does not support the proposition that Congress meant to take the unusual step of applying different causation standards in a comparative negligence regime." This reasoning is equally applicable to the negligence issue before us, because the standard of ordinary negligence applies to both the employer and the employee under traditional common-law principles and the FELA does not contain text suggesting a contrary standard. *Id.* at 807. In this case, however, the trial court correctly granted defendants' motion for summary disposition, regardless of whether we apply a more traditional standard or a relaxed standard of negligence.

The evidence was undisputed that the walkway area between Track Nos. 76 and 77 was resurfaced before plaintiff's accident on December 22, 2003, but that the area on the side of the track where plaintiff was injured had not been resurfaced or leveled. There was no evidence that this area was unsafe on the date of the accident. Further, there was evidence that this area could have been used by plaintiff to perform his job. Plaintiff's accident occurred on the un-resurfaced and unleveled side of Track No. 77 on top of a ballast slope. Plaintiff's attorney conceded that this area was not a walkway, but rather part of the track structure.

According to plaintiff's deposition, he did not like the ballast condition where he stood, but did not make a report. He also believed that he did not have much room to do his job properly. He stood close to the railroad ties while the conductor, James Haines, pushed the railroad car to force the coupling with another car. When he shifted his weight, the ballast gave away and plaintiff slipped at the start of the slope. He did not fall to the ground, but felt his right foot twist and a pain in his back. Plaintiff conceded that he could have stood on the flat area below the ballast slope to watch the coupling. It was, however, his custom to stand at the top because it provides a better view and felt it was safer to stand where he was rather than go up and down the slope. He indicated that each crew person chooses to do the job in the safest way possible.

Dwight Bohanon, the railroad trainmaster who worked in a supervisory capacity on the night of plaintiff's fall, confirmed that it was common for employees to walk on both sides of the track where the accident occurred. He has seen roadway ballast shift or move on steep sloped areas in the past, but has not experienced it in the yard where plaintiff was injured. Bohanon did not see plaintiff's accident, but opined that he could have selected a safer place to stand when performing the job. Dannie Lewis, the terminal superintendent at the time of plaintiff's accident, testified that employees have to work on both types of ballast, roadway and walkway, that are used in the yard. No written instructions or manual exists to tell employees where to walk, other than a basic principle that they should walk on level areas. A railroad rule provides that employees are to observe working conditions and avoid slipping, tripping, and falling hazards. Lewis opined that the embankment where plaintiff fell was such a hazard. It was okay for plaintiff to walk up the embankment if he took necessary precautions to do so safely, but he should not have stood on top of the embankment during the coupling.

Plaintiff's expert, James Arton, testified that the hazardous condition was the ballast slope. Although he did not find that any federal standard was violated by the slope and indicated that each railroad has its own standard to deal with problems associated with track support, Arton thought more suitable footing for employees working along the track was appropriate. Similarly, in an affidavit executed before his deposition, Arton opined that the conditions on the side of Track No. 77 where plaintiff's accident occurred was not suitable for foot traffic because it was sloping and consisted mainly of large, main line road ballast. Arton opined that defendants should be have constructed a walkway in the same manner as they had on the other side of the track or issue a safety bulletin or some type of written instructions and directions to warn and educate employees about the ground conditions.

We conclude that the evidence regarding the physical construction of the ballast area around Track No. 77, viewed in a light most favorable to plaintiff, does not support a reasonable inference that defendants breached a duty to provide a reasonably safe workplace. The evidence established that the decision regarding where to stand to perform the work was left to the employees.

We are not persuaded that the evidence supports a finding that the applicable standard of care required defendants to construct a walkway on both sides of Track No. 77, even with knowledge that employees regularly worked on both sides of the track. Although proposed by Arton, he failed to identify any relevant safety standard that require such construction. An expert opinion must be supported by sufficient facts or data and be the product of reliable principles and methods to be admissible. MRE 702. Expert testimony is inadmissible unless it would be

helpful to the trier of fact. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 790; 685 NW2d 391 (2004). An expert may give an opinion that embraces an ultimate issue of fact, but conclusory opinions do not create genuine issues of material fact. See MRE 704; *Quinto v Cross & Peters Co*, 451 Mich 358, 371; 547 NW2d 314 (1996); *SSC Assocs Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Considering that the relevant inquiry is whether defendants exercised reasonable care for plaintiff's safety, not whether a safer workplace could have been provided, we reject plaintiff's argument that Arton's opinion created a genuine issue of material fact. Cf. *Stillman v Norfolk & W R Co*, 811 F2d 834, 838 (CA 4, 1987) (testimony on safer, alternative methods of installing equipment not relevant).

We also reject plaintiff's argument that Joe Haines's (a GTW employee) affidavit created a genuine issue of a material fact with respect to whether the standard of care required the construction of a walkway on both sides of Track No. 77 to provide a reasonably safe workplace. We acknowledge that a lay witness is permitted to testify in the form of an opinion if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony or to determine a fact in issue. MRE 701; see also *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), (lay opinion must not be overly dependent on scientific, technical, or other specialized knowledge). Therefore, we find merit to plaintiff's position that the principle recognized in *Fritts v Toledo Terminal R Co*, 293 F2d 361 (CA 6, 1961), that opinions by experienced railroad employees, based on their perceptions at the time of an accident, may be considered relevant, could be applied in this case.

Here, however, although Haines was part of the crew working with plaintiff, Haines did not aver that he witnessed plaintiff's accident or was aware of any other accident occurring along Track No. 77. Haines averred, in a general sense, that the side of Track No. 77 where the accident took place was "extremely steep in certain spots," and that the ballast was unstable and provided poor footing on and before December 22, 2003. His opinion that there was a safety hazard might be rationally based on his perception of the area that he observed or walked on, but was not linked to the time or place of plaintiff's accident, or explain why plaintiff could not have stood elsewhere when performing his job. Further, while Haines averred that he made prior complaints about the conditions of the repair tracks, he provided no detail regarding the content of the complaints. He only indicated that, in response to complaints, defendants repaired and improved the area between Track Nos. 76 and 77, in an attempt to create a safe walkway, but did not work on the other side of Track No. 77 or issue a warning that employees should work only on the improved side. Conclusory averments in an affidavit do not create genuine issues of material fact. *Quinto, supra* at 371. Therefore, we find Haines's affidavit insufficient to preclude summary disposition under MCR 2.116(C)(10).

Further, the deposition of Walter Krejci, the track supervisor, while confirming that stone was put in place between Track Nos. 76 and 77 to create a walkway at the request of "someone," adds nothing to Haines's affidavit for purposes of creating a genuine issue of material fact. Krejci did not identify who made the request or why a walkway was requested, and was unaware of any complaints about the walking conditions before the work was done.

Considering the evidence that plaintiff's accident occurred in an area that was constructed as track support and defendants' construction of a safe area for plaintiff to work on the other side of the track, the material question is whether the standard of care required defendants to do more, in an informative sense, than to establish a rule requiring employees to observe working

conditions and avoid slipping, tripping, and falling hazards. What the employer is entitled to assume about an employee's behavior bears directly on its own duties. *Ackley, supra* at 268. It has often been said that one may assume that others will act carefully, but this does not always reflect reality or the facts of the case. *Id.* at 267. "As the risk of harm becomes more foreseeable, the duty to foresee that risk increases and the right to assume due care correspondingly decreased." *Id.* at 268.

Here, we agree with plaintiff that the specific standard of care applicable to defendants would include proper training, and not simply providing a reasonably safe workplace. *Dukes v Illinois Central R Co*, 934 F Supp 939, 945 (ND Ill, 1996). But plaintiff neither pleaded a deficiency in training nor offered evidence in opposition to defendants' motion for summary disposition regarding his training. Plaintiff's complaint alleged that defendants failed to warn him about an unsafe condition in the area where he was directed to perform his job. Similarly, while asserting inadequate training in opposition to defendants' motion and in this appeal, we note that plaintiff's claim is that some type of warning should have been provided regarding the conditions that existed along Track No. 77. A court is not bound by a party's choice of labels for an action because this would exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Substantively, therefore, we consider plaintiff's claim as one based on the duty to warn employees of unsafe conditions. *Ackley, supra* at 266 n 5.

It has been said that "there is no duty to warn against an obvious danger, for an obvious danger is no danger to a reasonably careful person." *Pomer v Schoolman*, 875 F2d 1262, 1268 (CA 7, 1989). At the same time, the responsibility to inspect premises where employees will be working and take reasonable precautions to protect employees from possible danger is a nondelegable duty under the FELA. *Cazad v Chesapeake & O R Co*, 622 F2d 72, 75 (CA 4, 1980). Further, it is not beyond reason to infer that an employee will be distracted, because of the job being performed, from recognizing an obvious hazard in the workplace. *Id.*

Here, plaintiff testified at his deposition that he was a long-time railroad worker, having been hired in April 1978. He had worked in the area of Track No. 77 for three weeks before his accident. Plaintiff testified that the actual coupling task that he performed on December 22, 2003, was normally done by the conductor, but that he and Haines agreed to switch their assignments. Plaintiff testified that he had frequently performed the coupling task and was not reluctant in doing so, but that as he started the job, he noticed and had concerns about the ballast conditions. Viewed in a light most favorable to plaintiff, the evidence indicates that the specific risk of harm that plaintiff faced while performing the coupling task on December 22, 2003, was not a hidden hazard, but rather a visible hazard created by the existence of a ballast slope of the support area for a repair track at the place chosen by plaintiff to perform the job. Although plaintiff's deposition indicates that it was dark outside, there was no evidence to support a reasonable inference that inadequate lighting conditions played a part in plaintiff's accident.

Had there been evidence that the job required that plaintiff stand on the top of the ballast slope or that his superiors knew or should have known that he would do so, we would not hesitate to find a genuine issue of material fact for trial. But under the circumstances presented, and even considering the evidence that employees regularly worked on both sides of Track No. 76, it cannot reasonably be inferred that defendants were negligent for failing to warn plaintiff of

the danger. Viewed in a light most favorable to plaintiff, we agree with the trial court that plaintiff failed to establish a genuine issue of material fact for trial. Therefore, the trial court did not err in granting defendants' motion.

Affirmed.

/s/ /Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey